

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

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UNITED STATES OF AMERICA :  
UNITED STATES COAST GUARD :  
: DECISION OF THE  
vs. :  
: VICE COMMANDANT  
LICENSE NO. 625323 and :  
MERCHANT MARINER'S DOCUMENT : ON APPEAL  
NO. 036-36-8906 :  
: NO. 2550  
Issued to: Joseph RODRIQUES, :  
Appellant :

This appeal has been taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By order dated September 25, 1991, an Administrative Law Judge (Judge) of the United States Coast Guard at New York, New York suspended Appellant's Coast Guard issued License and Merchant Mariner's Document for a period of four months, remitted on eight months probation, upon finding proved a charge of negligence and one of three supporting specifications.

The proven specification alleges that, during an outbound voyage on the evening of December 4, 1990, Appellant, while serving as Pilot under the authority of the captioned documents, negligently failed to maintain the M/V NANTUCKET, Official Number 556196, within the navigable limits of Lewis Bay Channel, Nantucket Sound, Massachusetts.

A hearing on this matter was held at Providence, Rhode Island on May 8, 1991. Appellant appeared with his Counsel,

William Hewig III, Esq. On the advice of Counsel, Appellant denied the charge and its three supporting specifications. The Investigating Officer offered into evidence twelve exhibits and introduced the testimony of five witnesses. Appellant offered into evidence two exhibits and introduced the testimony of one witness.

The Judge's written Decision and Order was issued on September 25, 1991, and served on Appellant on September 30, 1991. Appellant filed a notice of appeal on October 3, 1991, pursuant to 46 C.F.R. § 5.703. Appellant filed the completed appeal on November 22, 1991. Accordingly, this appeal is properly before the Vice Commandant for review.

APPEARANCE: William Hewig III, of Kopelman and Paige, P.C.,  
101 Arch Street, Boston, Massachusetts 02110-1137.

#### FINDINGS OF FACT

Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (Steamship Authority) operates a passenger and vehicle ferry service between Lewis Bay at Hyannis Harbor and Nantucket, Massachusetts.

Appellant's duly issued License No. 625323, authorizes him to serve as a First Class Pilot for the waters of Nantucket Sound on ferry routes between Hyannis Harbor, Lewis Bay, and Nantucket Harbor, Massachusetts. On December 4, 1990, the Steamship Authority employed Appellant aboard one of its vessels, the

M/V NANTUCKET, Official Number 556196. The M/V NANTUCKET is a steel-hulled vessel approximately 220 feet in length with a 60 foot beam, powered by two diesel reduction engines with a total of 3000 horsepower. The maximum draft aft is 9.6 feet. The Certificate of Inspection manning requirements include "1 Master & First Class Pilot" and "1 First Class Pilot".

At approximately 9:00 p.m. on December 4, 1990, with good visibility and a rising tide, the vessel departed Hyannis Harbor, bound for Nantucket Island via Lewis Bay Channel.

Approximately 10 crew and 30 passengers were on board. Captain James Hocking, the M/V NANTUCKET's Master, controlled the vessel's throttle and observed the radar. Two Able Seamen, also on the bridge, acted as lookouts. The Appellant was positioned at the helm in accordance with the Steamship Authority's unwritten [now written] fifty year old rule that requires its first class pilots to take the helm and actually steer its vessels in and out of port and through channels until reaching deep water.

Lewis Bay Channel is about 100 feet wide and the M/V NANTUCKET had to negotiate at least three difficult turns in the channel before entering open water. From the time the vessel departed Hyannis until, as further discussed below, immediately prior to the casualty which underlies the charge and specification at issue, Appellant, neither received any specific helm commands or other orders or directions from Captain Hocking, nor did Appellant request any assistance or direction.

At about 9:15 p.m., the M/V NANTUCKET passed Buoy Number 12 on the east side of the channel in its southbound transit through

Lewis Bay Channel. At this point, the vessel should have started to come right to safely negotiate the third of the three aforementioned turns. Captain Hocking noticed that the vessel had not started its turn, and belatedly gave the Appellant a helm command to steer the vessel to the right. Shortly thereafter, the port quarter of the vessel struck an object underwater on the east side of the channel. The vessel then continued on to its destination without further incident or delay. A later drydock examination of the vessel revealed damage to its port propeller.

### BASES OF APPEAL

Appellant advances a number of grounds for appeal. These may be summarized as follows:

1. The Coast Guard lacked jurisdiction to suspend his license.
2. The Judge erred in finding Appellant negligent for failing to request navigational assistance from the Master.
3. The presumption of negligence resulting from a grounding is not applicable against one found "not in charge of the navigation" of a vessel.
4. The Coast Guard failed to establish substantial evidence of a grounding outside the channel.

## OPINION

### I.

Appellant first asserts the Coast Guard lacked jurisdiction to suspend his license because the Judge found that he was "acting" as a "specialized" helmsman; thus he could not have been negligent while "serving" as a pilot. I disagree.

The three specifications supporting the charge of negligence each alleged that Appellant committed an act of negligence while "serving as pilot" aboard the M/V NANTUCKET under the authority of his First Class Pilot's license.

Jurisdiction exists to suspend Appellant's First Class Pilot's license if he was acting under the authority of that license at the time of the offense. 46 U.S.C. § 7703; Appeal Decision 2104 (BENSON). Under the applicable regulations, a person employed in the service of a vessel is considered to be acting under the authority of a license, when the holding of such license is required by law or regulation, or required by an employer as condition for employment. 46 C.F.R. § 5.57.

Jurisdiction is a question of fact that must be proven. Appeal Decision 2425 (BUTTNER). The regulations prohibit a vessel from being operated unless it has "in its service and on board" the personnel required by the Certificate of Inspection. 46 C.F.R. § 15.515(a). The Certificate of Inspection, required the M/V NANTUCKET to be manned, (1) by a Master who had the additional qualification of First Class Pilot and (2) by another officer with the sole qualification as First Class Pilot. The Certificate's requirement does not mean that Appellant must be in

charge; it merely sets out the minimum manning requirements. Captain Hocking met the qualifications of the first manning requirement. The Appellant met the second requirement as an officer qualified as First Class Pilot. The letter of employment from the Steamship Authority stated that Appellant was assigned to the vessel in accordance with the vessel's Certificate of Inspection (Investigating Officer Exhibit No. 2). The mere fact that the Judge found that Appellant was not "acting as" Pilot at the time of the alleged grounding does not automatically preclude jurisdiction over the license of an individual who was "serving as" pilot because of a vessel manning requirement. Therefore, the Certificate's manning requirement, issued in accordance with regulation, and satisfied by Appellant's First Class Pilot's license is sufficient to establish, for jurisdictional purposes, that Appellant was "serving as pilot" under the authority of his license.

Jurisdiction was also established here under the "condition of employment" test. 46 C.F.R. § 5.57(a)(2). Under that test, an individual is "acting under the authority" of a license if, by the mere fact, the employer requires possession of the license in order to serve aboard the vessel. Appeal Decision 2448 (POWER), Appeal Decision 1131 (OUGLAND). Here, the Steamship Authority required possession of a first class pilots license for its helmsmen. Thus, Appellant could be considered as acting under the authority of his first class pilot's license, even if he was merely a helmsman. See Commandant v. Rivera, NTSB Order EM-77 (1979), aff'g Appeal Decision 2126 (RIVERA).

## II.

The specification found proved alleges that Appellant negligently failed to maintain the vessel within the navigable limits of the channel. Negligence can be defined as the failure of an individual, either by omission or commission, to exercise that degree of care, vigilance, and forethought which, in the discharge of the duty then resting upon him, a person of ordinary caution and prudence ought to exercise under the circumstances. Appeal Decision 1387 (MOMOHARA); see also 46 C.F.R. § 5.59. Appellant asserts that it was error to find that he had a duty, and negligently failed, to request assistance. For the reasons below, I agree.

The Master, Captain Hocking, and the Appellant, both qualified first class pilots, were on the bridge at the time of the alleged grounding. Based on the conflicting testimony adduced at the hearing, the Judge concluded that, at the time of the alleged grounding, the Master was the First Class Pilot in charge of navigation, not the Appellant (Finding of Fact No.'s 14, 15, 17, 35, and 36, at pp. 5 and 8; opinion at 17).

Captain Hocking testified that during the channel transit he shined the spotlight on the buoys ahead of the vessel so the Appellant could decide when to begin the turn (Tr. at 29). There is no sound reason why the person "in charge" of navigation, and directing and controlling the vessel movement, would merely shine the light on a buoy and let the helmsman decide when to turn. Captain Hocking also testified that he was in charge of navigation but that he was not navigating at the time of the

alleged grounding (Tr. at 34). He further testified that the Appellant was in charge of the navigation and that he, the Master, was merely assisting him (Tr. at 34).

Captain Canha, Appellant's witness and the Steamship Authority's Port Captain and supervisor of the company's pilots and captains, testified that the Steamship Authority's policy required the first class pilots to take the helm during critical stages of the voyage, i.e., entering and leaving port. He also testified that the Master was in charge of the vessel at all times and that the pilot at the helm was subject to the Master's orders at all times during this evolution (Tr. at 147). However, he further testified that the pilot was at the helm because of his knowledge and that the pilot becomes the navigator of the vessel when he steers in and out of port and then afterwards pilots the vessel until the destination port (Tr. at 140).

While these statements regarding responsibility clearly contradict each other, I cannot say the Judge's finding, that the Master was "acting as" the pilot in charge of navigation at all times, was based upon inherently incredible evidence. Therefore, I will not set it aside. Appeal Decision 2333 (AYALA).

As a result, Appellant was found not negligent, under the second specification, in placing himself at the helm of the vessel (Finding of Fact 35). Since he was not in charge of navigation, he was also not found negligent under the third specification, which alleged that he failed to "make use of available means, including but not limited to radar, nautical charts, and visual sightings, to determine the vessel's



position..." (Finding of Fact 36). The Judge then dismissed the second and third specifications.

In finding the first specification proved, the Judge reasoned that because Appellant had responsibility and freedom to make helm decisions, he was more than an ordinary helmsman. By this reasoning, he was required to exercise a greater degree of care in performing his duties than an ordinary helmsman (Decision and Order at 7). Thus, according to the Judge, part of Appellant's required degree of care involved seeking the assistance of the Master in navigating.

I have held that the person in charge of navigation has a duty to use all available means to assist him navigating and seeking the assistance of the Master is "in itself" one of those means. Appeal Decision 328 (SKJAVELAND). Here, the Judge found that Appellant was not in charge of navigation. He then dismissed the second specification because it was not proved that a person not in charge of navigation is also required to use available means to assist in navigating. Absent other authority, it would be logically and legally inconsistent to dismiss one specification because of insufficient proof that Appellant had even a general duty to use available means of navigation, yet find proved a separate specification because he had a duty to use a specific means of navigation, i.e. the assistance of the Master.

Furthermore, the standard applied by the Judge has not been announced in earlier Appeal Decisions, nor is it "readily apparent" from customary principles of good seamanship and common

sense. Appeal Decision 2302 (FRAPIER). The duties resting upon the Appellant on the bridge of the M/V NANTUCKET on December 4, 1990, are as unclear from the record as they appear to have been in actual practice. Therefore, I do not find that Appellant had the duty to request assistance from the Master.

### III.

Even though the Judge erred in finding Appellant violated a duty as a "specialized helmsman", Appellant can still be held negligent if the presumption of negligence is applicable. It is well settled that the grounding of a vessel on a charted shoal, or where it has no business being, raises a rebuttable presumption of negligence against the person responsible for the vessel's navigation. Appeal Decision 2465 (O'CONNELL); Appeal Decision 2382 (NILSEN), aff'd. sub. nom., NTSB Order EM-126 (1985). Appellant contends that the presumption of negligence in groundings is assertible only against the person in charge of navigation. I disagree.

The Judge's finding that Appellant was not in charge of navigation at the time of grounding raises questions about the applicability of the presumption of negligence to persons not in charge of navigation. The Fifth Circuit Court of Appeals has held that the presumption of negligence, arising when a moving vessel allides with a fixed object, "works against all parties participating in the management of the vessel at the time of contact." Woods v. United States, 681 F.2d 988, 990 (1982). Woods involved a Coast Guard suspension and revocation proceeding in which a vessel's Master had proved against him a charge of

negligence by application of an un rebutted presumption of negligence. Id. Based on the holding in Woods, the subsequent actions of a pilot, master, and bow crew were subject to a presumption of negligence in a vessel allision with a stationary object. Delta Transload Inc. v. M/V Navios Commander, 818 F.2d 445, 449 (5th Cir. 1987). Thus, properly raised, the presumption of negligence in a grounding applies against all those involved in the management of the vessel at the time of the incident, including the Appellant here.

#### IV.

Appellant contends that it was clear error for the Judge to find substantial evidence that the vessel departed the channel. I agree. In this case, the only evidence that the vessel departed the channel was the grounding. Evidence of the grounding was derived from the testimony of the Master. He made a log entry at the time of the incident, that the vessel "touched port side of channel..."(Investigating Officer's Exhibit No. 9). He completed Form CG-2692, stating essentially the same information (Investigating Officer's Exhibit No. 12). He testified that the width of the channel is 100 feet, and the width of the vessel is 60 feet, necessitating precise course alterations. The Master also testified that the Appellant initiated a critical turn too late, which was followed almost immediately by the "rear quarter" of the vessel scraping against the side of the channel (Tr. at 40-44).

On cross-examination, the Master, testified that he didn't know exactly where the vessel was when it scraped bottom, and that it was possible that the vessel may have been in the channel at that time (Tr. at 56-57). He further testified, that because of shoaling, he could not testify that the vessel actually left the channel when it hit bottom (Tr. at 69-70).

The Investigating Officer attempted to come forward with additional evidence. On redirect examination, he asked the Master to place an "X" on the chart to mark the location of the grounding.

IO: Your Honor, if I could have IO Exhibit No. 8, I would like [the Master] to indicate the positioning of the grounding on that chart.

APPELLANT: I'm going to object, your Honor, he [the Master] has testified that he was not using -- he did not have a radar fix at the time of the grounding, he did not take visual bearings, he did not mark it on the chart, he did not have Loran readings, he didn't know latitude and longitude, and he had no basis or no way to know the precise location of the grounding.

JUDGE: That's what I thought his testimony was, he didn't know exactly where he was. If he thinks he can pinpoint it, I'll let him do it and you can recross him on it. I don't know how he can ....

...

[Witness puts an X on chart]

...

JUDGE: .... Now, that marking that you just put there from your testimony is merely a guess.

THE WITNESS: Yes.

(Tr. at 70-72).

As stated above, the presumption of negligence is properly raised when it is shown by substantial evidence that the vessel grounded on a charted shoal, or where it has no business being.

Appeal Decision 2465 (O'CONNELL); Appeal Decision 2382 (NILSEN), aff'd. sub. nom., NTSB Order EM-126 (1985). This case involved no charted shoals. In fact, the evidence in the record showed that the grounding could have occurred on an uncharted shoal within the navigable limits of the channel. The presumption of negligence does not arise by the "mere fact of striking a sunken or hidden object." Delta Transload, supra at 450 (citing Peoples Natural Gas Co. v. Ashland Oil, Inc., 604 F.Supp 1517, 1525 (W.D.Pa. 1985); Commandant v. Jahn, NTSB Order EM-88 (1981).

Thus, I find that the presumption of negligence was not properly raised and was not applicable against the Appellant. The specification alleged that the Appellant failed to maintain the vessel within the navigable limits of the channel. The sole evidence of negligence relevant to the specification was the grounding. The evidence adduced showed that the grounding could have occurred within the navigable limits of the channel.

## CONCLUSION

It is apparent from the foregoing discussion that the first specification and charge of negligence cannot be sustained and should be dismissed, with prejudice.

ORDER

The Order of the Administrative Law Judge, dated at New York, New York on September 25, 1991, is VACATED. The charge is DISMISSED.

Robert T. Nelson  
Vice Admiral, U.S. Coast Guard  
Vice Commandant  
Signed at Washington, D. C. this 28th day of June, 1993.